## IN THE SUPREME COURT OF THE STATE OF DELAWARE

§
§ No. 591, 2013
§
§
§
§ Court Below—Superior Court
§ of the State of Delaware,
§ in and for New Castle County
§ Cr. ID 1211010656
§
§

Submitted: April 8, 2014 Decided: May 9, 2014

Before HOLLAND, BERGER, and JACOBS, Justices.

## ORDER

This 9<sup>th</sup> day of May 2014, upon consideration of the appellant's Supreme Court Rule 26(c) brief, the State's response thereto, and the record below, it appears to the Court that:

(1) On August 2, 2013, after a three day trial, a Superior Court jury found the appellant, Prentice Triplett, guilty of possession of a firearm by a person prohibited ("PFBPP"). On October 4, 2013, the Superior Court found that Triplett was a habitual offender and sentenced him to the minimum mandatory sentence of eight years at Level V. This is Triplett's direct appeal.

- (2) On appeal, Triplett's appellate counsel ("Counsel") filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"). Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Counsel informed Triplett of the provisions of Rule 26(c) and provided Triplett with a copy of the motion to withdraw and the accompanying brief. Counsel also informed Triplett of his right to identify any points he wished this Court to consider on appeal. Triplett has raised several issues for this Court's consideration. The State has responded to the issues raised by Triplett and moved to affirm the Superior Court's judgment.
- (3) When reviewing a motion to withdraw and an accompanying brief, this Court must: (i) be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (ii) must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>2</sup>
- (4) The trial transcript in this case reflects that the Wilmington Police Department was investigating Triplett in November 2012. On

<sup>&</sup>lt;sup>1</sup> Triplett was represented by different counsel at trial.

<sup>&</sup>lt;sup>2</sup> Penson v. Ohio, 488 U.S. 75, 83 (1988); Leacock v. State, 690 A.2d 926, 927-28 (Del. 1996).

November 14, 2012, the Wilmington Police Department executed a search warrant for 1218 Pleasant Street, Wilmington, Delaware. Prior to execution of the search warrant, Officer Deshaun Ketler observed a man leaving the house. Detective Alexis Schupp identified that man as Triplett.

- (5) While searching the unoccupied house, the police found a man's jacket containing a Colt .38 revolver loaded with five live, and one spent, rounds of ammunition and a pair of boots containing multiple bags of marijuana in the living room. The gun, wrapped in a direct deposit slip bearing Triplett's name, the 1218 Pleasant Street address and a date of November 6, 2012, was found in the left pocket of the jacket. A Delaware identification card bearing Triplett's name and the 1218 Pleasant Street address was found in the right pocket of the jacket.
- (6) The gun was examined for fingerprints, but there were not enough details to perform a fingerprint comparison. Triplett's counsel also elicited testimony that the ammunition and deposit slip were not tested for fingerprints, no DNA comparison testing was performed on the evidence collected, and mail bearing Triplett's name at the house was from several months earlier. There was conflicting testimony regarding Triplett's location (on the front steps of the house versus on the sidewalk a few houses down) when identified by Detective Schupp on November 14, 2012. Triplett

called one witness, his probation officer, who testified that he granted Triplett's request for permission to move from 1218 Pleasant Street to 715 West 8<sup>th</sup> Street and that he visited Triplett at the West 8<sup>th</sup> Street address in October 2012.

- (7) The parties stipulated that Triplett was a person prohibited from owning or possessing firearms, ammunition or deadly weapons.
- (8) After the State rested its case, Triplett's counsel moved for a judgment of acquittal on all counts. The Superior Court denied the motion with respect to the PFBPP count, but deferred decision on the remaining counts. The jury ultimately found Triplett guilty of PFBPP and not guilty of drug dealing, possession of a firearm during commission of a felony, and possession of drug paraphernalia.
- (9) On appeal, Triplett contends: (i) the search warrant for 1218 Pleasant Street was defective; and (ii) there was insufficient evidence supporting his conviction.
- (10) Although Triplett filed letters with the Superior Court in which he raised a number of issues concerning his defense, including requests that his counsel move to suppress the evidence seized pursuant to the search warrant, no motion to suppress was ever filed with the Superior Court. A

motion to suppress evidence must be filed before trial.<sup>3</sup> Triplett's failure to file a motion to suppress in the Superior Court constitutes a waiver of any challenges to the search warrant.<sup>4</sup> Accordingly, this Court will not consider Triplett's challenges to the search warrant on this direct appeal.

Triplett's conviction, the Court must "determine whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of all the elements of the charged crime." A conviction for PFBPP requires proof that the defendant is a prohibited person and that he knowingly "possesses, purchases, owns or controls a deadly weapon or ammunition for a firearm." The parties stipulated that Triplett was a prohibited person. With respect to possession, sufficient evidence of constructive possession will support a PFBPP conviction. To prove constructive possession of a gun, the State must show that the defendant: (i) knew the location of the gun; (ii) had the ability to exercise dominion and control over the gun; and (iii) intended to

\_

<sup>&</sup>lt;sup>3</sup> Del. Super. Crim. Cr. R. 12(b)(3).

<sup>&</sup>lt;sup>4</sup> Del. Supr. Ct. R. 8; Del. Super. Crim. Ct. R. 12(f).

<sup>&</sup>lt;sup>5</sup> Lecates v. State, 987 A.2d 413, 418 (Del. 2009).

<sup>&</sup>lt;sup>6</sup> 11 *Del. C.* § 1448(b).

<sup>&</sup>lt;sup>7</sup> *Lecates*, 987 A.2d at 426.

exercise dominion and control over the gun.<sup>8</sup> It is well-settled that circumstantial evidence may prove constructive possession.<sup>9</sup> Establishing PFBPP does not require evidence that the weapon was physically available and accessible to the defendant at the time of arrest.<sup>10</sup>

- (12) Viewing the evidence in the light most favorable to the State, a reasonable jury could find Triplett guilty of PFBPP beyond a reasonable doubt. The trial record reflects that the .38 revolver was found in a jacket pocket containing a direct deposit slip with Triplett's name and a date of November 6, 2012, another pocket of the same jacket contained a Delaware identification card with Triplett's name, and Triplett was observed leaving the house shortly before the jacket was found in the house. As far as any conflicting testimony concerning where Triplett was located when identified by Detective Schupp, the "jury is the sole judge of a witness' credibility and is responsible for resolving conflicts in testimony."
- (13) The cases identified by Triplett in support of his appeal—

  Johnson v. State, 27 A.3d 541 (Del. 2011) and United States v. Wilmer, 2009

  WL 275472 (D. Del. Feb. 4, 2009)—do not lead to a different result. In

  Johnson, this Court held that the Superior Court erred in failing to give a

<sup>&</sup>lt;sup>8</sup> Id.; State v. Clayton, 988 A.2d 935, 936 (Del. 2010).

<sup>&</sup>lt;sup>9</sup> *Lecates*, 987 A.2d at 426.

<sup>&</sup>lt;sup>10</sup> *Id.* at 420-21.

<sup>&</sup>lt;sup>11</sup> Pryor v. State, 453 A.2d 98, 100 (Del. 1982).

Lolly instruction to the jury based on the police's failure to collect clothing concealing the guns leading to the charges and where other evidence suggested a different person may have possessed the guns.<sup>12</sup> Here, however, the police collected the jacket containing the gun and there was little evidence suggesting somebody other than Triplett possessed the gun. In Wilmer, a federal case applying 18 U.S.C. §§ 922 and 924, the United States District Court for the District of Delaware granted a motion for judgment of acquittal in favor of a defendant who was seen with his hands in an apartment complex trash can containing a gun.<sup>13</sup> Unlike this case, there was no identification card or deposit slip bearing the defendant's name with the gun and the district court concluded there was insufficient evidence to show the defendant intended to exercise dominion and control over the gun.<sup>14</sup>

(14) This Court has reviewed the record carefully and has concluded that Triplett's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Triplett's counsel has made a conscientious effort to examine the record and the law and has properly determined that Triplett could not raise a meritorious claim in this appeal.

\_

<sup>&</sup>lt;sup>12</sup> *Johnson*, 27 A.3d at 548.

<sup>&</sup>lt;sup>13</sup> Wilmer, 2009 WL 275472, at \*3.

<sup>&</sup>lt;sup>14</sup> *Id.* at \*3.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Carolyn Berger
Justice